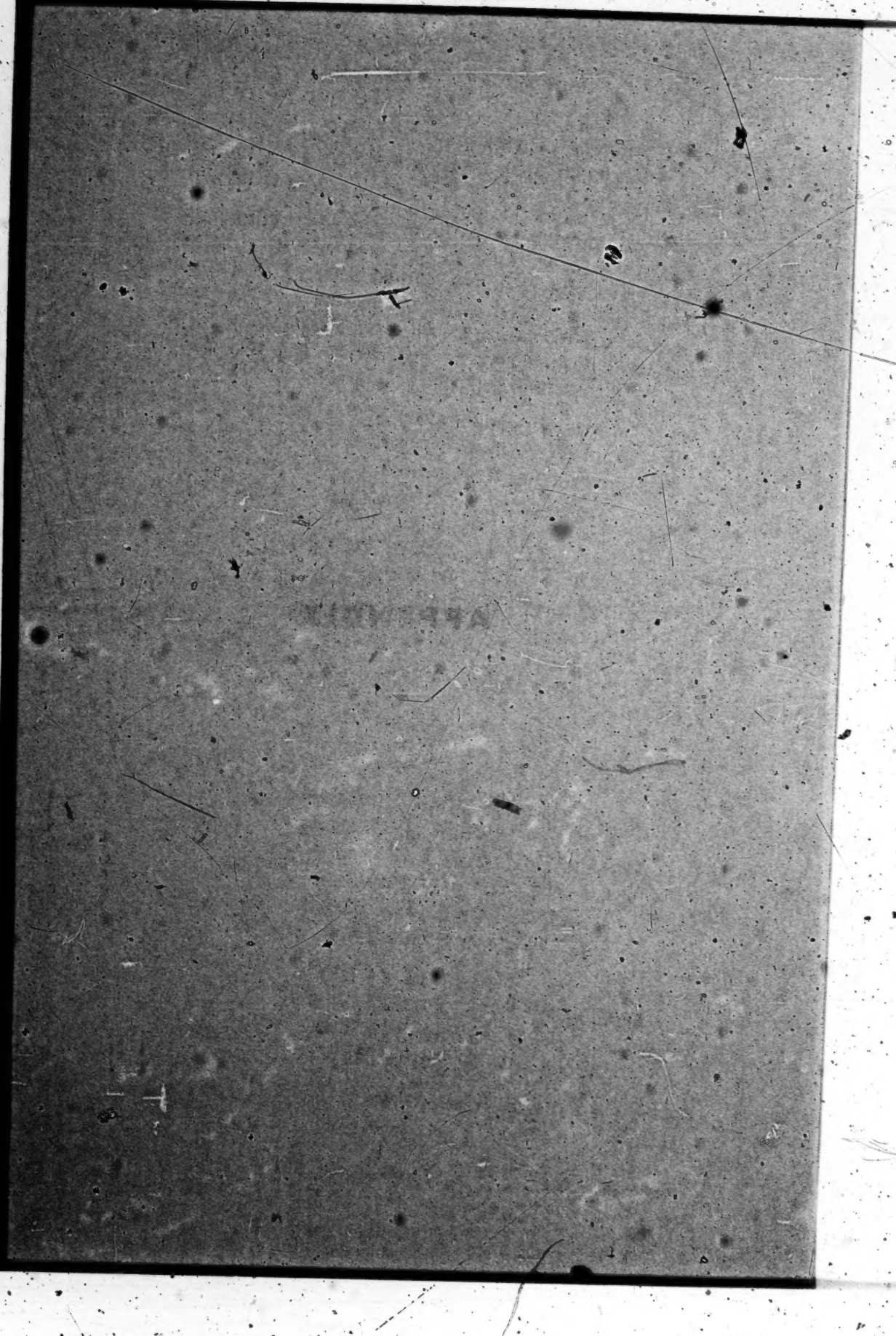

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 25605

DONALD M. TANNER, *et al.*
Appellees,

v.

LLOYD CORPORATION, LTD.,
Appellant.

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed, with costs in this Court in favor of the appellees and against the appellant.

Filed and entered July 7, 1971.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 25,605

DONALD M. TANNER, BETSY WHEELER, and SUSAN ROBERTS,

Appellees,

v.

LLOYD CORPORATION, LTD.,

Appellant.

[July 7, 1971]

Appeal from the United States District Court for the District of Oregon

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Before: ELY and KILKENNY, Circuit Judges, and LINDBERG, District Judge.*

PER CURIAM:

The appellant and its lessees operate a huge private shopping facility, embracing about fifty acres in the City of Portland, Oregon. The District Court enjoined the appellant from interfering with the appellees' exercise, on the facility premises of certain peaceful activities which the court found were protected under the guarantees of the First Amendment. The court's legal conclusion followed from its factual determination that the appellant's facility was, in scope, "the functional equivalent of a public business district." *Tanner* v. *Lloyd Corp., Ltd.*, 308 F. Supp. 128, 130 (D. Ore. 1970); *cf. Wolin* v. *Port of New York Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968). *See also Amalgamated Food Employees Un-*

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* Hon. William J. Lindberg, United States District Judge, District of Washington, sitting by designation.

ion v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968); *Marsh* v. *Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946). Since such a factual determination, in relation to a particular case, must necessarily rest upon a consideration of all of the demonstrated circumstances of that case, we have concluded that we are powerless to hold that the critical factual determination which is here involved was clearly erroneous. Accordingly, the judgment is affirmed upon the basis of the District Court's Findings of Fact and the reasoning logically followed therefrom, set forth in the court's Opinion reported at 308 F. Supp. 128 (D. Ore. 1970). *See also Diamond* v. *Bland*, 3 Cal. 3d 653, 477 P. 2d 733, 91 Cal. Rptr. 501 (1970), *cert. denied sub nom. Homart Dev. Co.* v. *Diamond*, ___ U.S. ___ (U.S.L.W. May 18, 1971).

Affirmed.[1]

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[1] Our opinion is not, of course, an extension of the holdings of the Supreme Court in *Amalgamated Food* and *Marsh*. The extent to which the appellant's facility had been opened to public use is reflected in the District Court's factual determinations. It was found, *inter alia*, that

> "The Mall is open to the general public. In addition, the Corporation invites groups to conduct activities there, if those activities will promote 'customer motivation.' It has invited schools to hold football rallies, service organizations to hold Veterans Day ceremonies, and presidential candidates to give speeches during election years.
>
> "The Corporation also permits groups which it believes to be worthy to use the Mall even though they do not add to 'customer motivation.' It permits the American Legion to sell 'buddy' poppies at least once each year, and every year before Christmas, it permits bellringers for the Salvation Army and Volunteers of Ameria to set up kettles and solicit contributions.
>
> "The Corporation prohibits other groups from using the Center for their own purposes. It denied the March of Dimes and Hadassah, a national Zionist women's service organization, the opportunity to solicit contributions and denied Governor Tom McCall the opportunity to make a political speech. As part of this policy, the Corporation prohibits the distribution of handbills within the Mall."

308 F. Supp. at 129-30.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 69-127

DONALD M. TANNER, BETSY WHEELER, and SUSAN ROBERTS,

Plaintiffs,

v.

LLOYD CORPORATION, LTD.,

Defendant.

DECLARATORY JUDGMENT AND DECREE

Based upon the Opinion of the Court dated January 15, 1970, which constitutes findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure, it is

ORDERED, that:

1. Plaintiffs have a right to distribute non-commercial handbills in a peaceful and orderly manner in the malls and walkways within Lloyd Center at times when they are open to general public access;

2. For the reasons set forth in the Court Opinion dated January 15, 1970, defendant Lloyd Corporation, Ltd., its officers, agents, servants and employees, and those persons in active concert or participation with them who receive actual notice of this declaratory judgment and decree by personal service or otherwise, are enjoined from preventing or interfering with the distribution of non-commercial handbills in a peaceful and orderly manner in the malls

and walkways within Lloyd Center at times when they are open to general public access; and

3. Plaintiffs have judgment against Lloyd Corporation, Ltd. for their costs and disbursements incurred herein, taxed in the amount of $157.92.

DATED this 27th day of January, 1970.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 69-127

DONALD M. TANNER, BETSY WHEELER, and SUSAN ROBERTS,

Plaintiffs,

v.

LLOYD CORPORATION, LTD.,

Defendant.

OPINION

SOLOMON, Chief Judge:

Donald Tanner, Betsy Wheeler and Susan Roberts brought this action under 42 U.S.C. § 1983[1] and 28 U.S.C. § 2201[2] for a judgment declaring that they have the right to distribute handbills in the Mall of Lloyd Center, a shopping center owned by Lloyd Corporation, Ltd. (Corporation). Plaintiffs also seek to enjoin the Corporation

[1] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[2] "In a case of actual controversy within its jurisdiction, * * * any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

from interfering with that right. Plaintiffs allege jurisdiction under 28 U.S.C. § 1343.[3]

With a few minor exceptions, the parties agree on the facts, but not on the conclusions to be drawn from those facts.

Lloyd Center is a large, modern retail shopping center in Portland, Oregon. The Center covers about 50 acres, including about 20 acres of open and covered parking facilities for more than 1,000 automobiles. It has a perimeter of almost one and one-half miles. The Center is bounded by four public streets—Broadway Street, Lloyd Boulevard, and Ninth and Sixteenth Avenues. It is crossed by Weidler, Halsey, Multnomah, and Holladay Streets running east to west and by Fifteenth Avenue running north to south. At least six other streets run partly into or around the Center.

The streets in and surrounding the Center are publicly owned and have adjacent public sidewalks. The Corporation owns all other land within the Center, and has more than 60 commercial tenants, including small shops and major department stores.

At a few places within the Center, the Corporation has embedded small signs in the sidewalk,[4] which state:

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[3] "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * * (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States * * *."

[4] Plaintiffs' counsel went to the Center and was unable to find these signs. Mr. Horn, the manager of the Center, testified that he ordered the signs installed several years ago and that he assumed they were still there although he did not know exactly where they were.

"NOTICE—Areas In Lloyd Center Used By The Public Are Not Public Ways But Are For The Use of Lloyd Center Tenants And The Public Transacting Business With Them. Permission To Use Said Areas May Be Revoked At Any Time. Lloyd Corporation, Ltd."

The principal portion of the Center is occupied by a unified shopping area, called the "Mall," which covers about 25 acres and has a perimeter of about .8 miles. It is not crossed by public streets. The Mall is a multi-level complex of buildings, parking facilities, sub-malls, sidewalks, stairways, elevators, escalators, bridges, and gardens, and contains a skating rink, statues, murals, benches, directories, information booths, and other facilities designed to attract visitors and make them comfortable.

Pedestrians have access to some of the Mall stores through entrances on both public and Mall sidewalks, while they have access to other stores only from the interior of the Mall. Automobiles enter the Mall from the surrounding public streets.

The Mall is open to the general public. In addition, the Corporation invites groups to conduct activities there, if those activities will promote "customer motivation." It has invited schools to hold football rallies, service organizations to hold Veterans Day ceremonies, and presidential candidates to give speeches during election years.

The Corporation also permits groups which it believes to be worthy to use the Mall even though they do not add to "customer motivation." It permits the American Legion to sell "buddy" poppies at least once each year, and every year before Christmas, it permits bellringers for the Salvation Army and Volunteers of America to set up kettles and solicit contributions.

The Corporation prohibits other groups from using the Center for their own purposes. It denied the March of Dimes and Hadassah, a national Zionist women's service

organization, the opportunity to solicit contributions and denied Governor Tom McCall the opportunity to make a political speech. As part of this policy, the Corporation prohibits the distribution of handbills within the Mall.

The Corporation enforces its rules through twelve commissioned special police officers of the City of Portland, whom it employs as Security Guards. The Guards have full police authority, carry guns, and wear uniforms similar to those worn by the Portland Police.

On November 14, 1968, Plaintiffs entered the Mall and distributed handbill invitations to a meeting of the "Resistance Community" to protest the draft and the Vietnam War. The distribution was quiet, orderly, and did not interfere with the Mall selling activities, and there was no littering. Nevertheless, the Security Guards told Plaintiffs that they would be arrested unless they stopped distributing the handbills within the Mall. The Guards suggested that Plaintiffs distribute their literature on the public streets and sidewalks. Plaintiffs left the Mall to avoid arrest [5] and subsequently brought this action.

The Corporation raises a number of preliminary issues of fact and law.

1. The Corporation asserts that the Mall is not open to the general public; that it is similar to an office building; and that the signs in the sidewalk inform visitors

[5] Plaintiffs testified that they were told that they *would* be arrested, and that they left to avoid arrest. The Corporation asserts that the Guards said that they *could* call regular city police officers to arrest Plaintiffs. The Agreed Facts in the Pretrial Order state that the Guards told Plaintiffs they *could* be arrested. According to the testimony of the Corporation, the Guards have arrested persons on the Mall for other offenses, but have never arrested anyone for distributing handbills and did not intend to arrest Plaintiffs here. The Corporation refuses to promise that it will not arrest Plaintiffs if they return to distribute handbills.

In my view, the Guards caused Plaintiffs to believe that the Guards, in their official capacity as policemen, would arrest Plaintiffs or would cause their arrest.

that they are permitted to enter the Mall only for the purpose of transacting business.

In 1954, when the Corporation acquired land for the Center, the City of Portland vacated about eight acres of public streets for use by the Corporation. The ordinance by which the City vacated the streets recited that the City intended that the Corporation should use the land for the construction of "a general retail business district." In spite of this ordinance, the Corporation now asserts that the Mall is like an office building rather than like a public business district. Although the Mall's multi-level design is not yet common among modern shopping centers, the Mall is a prototype for future city planning. Its parking facilities and sidewalks serve the same purpose as streets and sidewalks of a public business district. I find that the Mall is the functional equivalent of a public business district. *Cf. Wolin* v. *Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968).

The Corporation invites everyone to the Center and permits anyone to enter the Mall. It hopes that visitors who go there without the intention of buying will change their minds while visiting at the Center or while windowshopping or browsing. The few "private property" signs embedded in the sidewalk are small. Few people are likely to notice them. The Center's manager did not even know where they were. Although the parking facilities are closed during the late night and early morning hours, the walkways in the Mall are open to pedestrian traffic 24 hours a day. I find that the Mall is open to the general public.

2. The Corporation asserts that the distribution of handbills interferes with Mall selling activities. It is true that under some circumstances, conduct accompanying the distribution of handbills could interfere with Mall business. Here, however, Plaintiffs' sole activity was the distribution of handbills to those who were willing to take them. There was no litering or disturbance. I find that

Plaintiffs were engaged in the pure expression of political beliefs. *Cf. Wolin* v. *Port of New York Authority, supra.* Plaintiffs' activities affected Mall business only to the extent that the expression of beliefs interferes with customers' motivation to buy.

3. The Corporation contends that Plaintiffs can distribute handbills just as effectively from the public streets and sidewalks as from the interior of the Mall. It would be difficult and perhaps dangerous for Plaintiffs to distribute their handbills from the public sidewalks to customers entering the Mall. Many customers do not use the public sidewalks and streets except when entering the Mall by automobile. In addition, it would be much more difficult to reach pedestrians on the public sidewalks than to reach them in parts of the Mall interior through which most customers pass. I find that Plaintiffs cannot distribute handbills as effectively from the public streets and sidewalks as they can from the Mall interior.

4. The Corporation's contention that its Guards were merely exercising their First Amendment rights when they told Plaintiffs to leave or be arrested is frivolous.

5. The Corporation contends that it relied solely on the Oregon trespass statute when it ordered Plaintiffs to leave. It argues that this Court should abstain from deciding this case until the Oregon courts have decided whether the statute applies to Plaintiffs.[6] In the alternative, the Corporation argues that a three-judge court must hear this case because it is an action to declare the Oregon trespass statute unconstitutional. The Corporation does not, however, concede that Plaintiffs have the right to distribute handbills within the Mall if the Oregon statute is inapplicable. It claims the private property right under the Fifth Amendment to exclude Plaintiffs regardless of the statute. The issue here, therefore, is not

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[6] The Corporation admits that no action which would yield such a decision is pending in the Oregon courts.

whether the Oregon statute is constitutional. It is whether the Fifth Amendment gives the Corporation the right to prohibit Plaintiffs' activities.

6. The Corporation asserts that Plaintiffs failed to state a cause of action under 42 U.S.C. § 1983 because the Corporation did not act under color of state law. The Corporation's Security Guards had full police authority from the City of Portland and exercised that authority to cause Plaintiffs to leave the Mall. This constituted action under color of state law. See *Williams* v. *United States*, 341 U.S. 97 (1951); *De Carlo* v. *Joseph Horne & Co.*, 251 F.Supp. 935 (W.D.Pa. 1966).

On the merits of this case, I find that the Corporation's rule prohibiting the distribution of handbills within the Mall violates Plaintiffs' First Amendment rights. I do not believe the Corporation may decide what groups may distribute literature within the Mall. Neither do I believe the Corporation may prohibit all distribution of handbills.

In *Marsh* v. *Alabama*, 326 U.S. 501 (1946), Marsh, a Jehovah's Witness, was convicted of trespass because she distributed religious literature in the shopping area of a company town after the owner warned her to leave. The town, Chickasaw, Alabama, had all the characteristics of a normal American town. Its streets and sidewalks, though privately owned, connected to publicly owned streets and were open to the general public.

Alabama argued that the owner had absolute dominion over the use of his property and that the owner had the right to bar the distribution of all literature within the town or to decide which literature could be distributed. The Court rejected this argument:

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory

and constitutional rights of those who use it." 326 U.S. at 506.

For citizens to participate in this nation's government, the Court said, it is necessary that the public be informed and that its information be uncensored. Balancing Marsh's First Amendment rights against the owner's property rights, the Court held that Marsh's rights occupied a "preferred position" and weighed heavier than the owner's rights. The Court therefore reversed Marsh's conviction.

Plaintiffs' distribution of handbills here was identical to the distribution of literature in *Marsh*. Here also, the owner claims the right to bar the distribution of literature or to select which literature may be distributed. The sole distinction between this case and *Marsh* is that this case involves a shopping center whereas *Marsh* involved a town. I do not believe that distinction should cause a different result.

In *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), the Supreme Court expressly extended *Marsh* to shopping centers. The Logan Valley Mall was bordered on two sides by public streets and had a perimeter of 1.1 miles and space for at least 17 commercial tenants. It was open to the general public and had sidewalks, parking lots, and roadways for automobiles. The owner sought to enjoin a union from picketing a store within the shopping center.

The owner argued that *Marsh* involved an entire town and therefore was not applicable to a shopping center. The Supreme Court did not agree:

> "We see no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the

"business district' is not under the same ownership." 391 U.S. at 319.

It is true that the Court in *Logan Valley* left open the question whether the owner could bar picketing which was not directly related to the use of the center. Here, Plaintiffs' distribution of handbills was pure speech. I believe that there is no reason, as the Court said in *Logan Valley*, to distinguish a company town from a shopping center which functions as a business district.

If *Logan Valley* does not go as far as I suggest, the First Amendment does. In my view, an owner who opens his land to the general public for business purposes, to the extent that the land becomes the functional equivalent of a public business district, gives up the right to prohibit the distribution of literature or to decide which literature may be distributed. If this were not true, the public need for uncensored information, on which *Marsh* was based, could be frustrated.

After Plaintiffs brought this action, the Corporation, in an attempt to avoid an adjudication on the merits, asserted that Plaintiffs' distribution of handbills on November 14 violated the Selective Service laws. I do not believe this contention is relevant to this controversy. The evidence shows that the Guards were enforcing their employer's policy prohibiting individuals from distributing handbills unless they received prior approval by the Corporation. There is no evidence that the Guards thought Plaintiffs' activities were illegal. If they did, it would be unlikely that they would have suggested that Plaintiffs continue their activities on the public sidewalks. If the Corporation wishes to prevent speech which it believes is illegal, it should do so through arrest and prosecution in the normal course, not through the prohibition of all speech. *Wolin* v. *Port of New York Authority, supra*, 392 F.2d at 91 n. 11.

Plaintiffs are entitled to a judgment declaring that they have the right to distribute handbills within the Lloyd Center Mall. They are also entitled to an injunction restraining Lloyd Corporation from interfering with that right.

This opinion shall constitute findings of fact and conclusions of law in accordance with Rule 52(a) Fed.R. Civ.P.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

Kent, Sc. Superior Court

'70-275

HOMART DEVELOPMENT COMPANY,

v.

DANIEL FEIN, JOSEPH TRAUGOTT, JOHN POWERS.

August 6, 1970.

(P. M. Session.)

LAGUEUX, *J.*: This matter is before the court on a prayer for a temporary injunction by Homart Development Company against Daniel Fein, Joseph Traugott, John Powers and the Rhode Island Socialist Workers Party. The claim is that the defendants individually as candidates for national and state office under the banner of Rhode Island Socialist Workers Party have entered onto premises owned by the plaintiff and leased by it to tenants, for the purpose of soliciting signatures on primary nomination papers and exhorting customers of these tenants to support their views and that they have been denied permission to use these premises for that purpose and that they have indicated that they will continue to use the premises for that purpose unless enjoined temporarily and permanently in accordance with the prayer. So the case is before the court now on a request for a temporary injunction.

The basic test which is applied in determining whether a temporary injunction shall issue is whether or not there

is a reasonable probability that the plaintiff will prevail at the hearing on the merits. This case does not present many factual disputes. It essentially presents a basic question of law. However, I think it's necessary for the court to make some preliminary findings of fact. The premises owned by the plaintiff consist of some forty-five acres of land in the city of Warwick containing some seventy-three stores which are leased out. The unusual feature of this shopping center is that it is essentially under one roof in two levels with a minor exception; namely, there is a Sears Auto store in another location on the premises and another minor building. The parking area is very large. This shopping area is open to the public between 9:30 in the morning and 9:30 in the evening, six days a week, and on Sundays some of the businesses in the area are open although not all. Probably the majority of them are not open on Sunday. The testimony is that on an average day 18,000 people attend the area for various purposes. The plaintiff, Homart Development Company, which operates eight of these centers throughout the country, has a national policy and I find that they have a local policy, non-discriminatory in effect, that no political candidates will be allowed to use their premises for solicitation purposes. That means that no candidates will be allowed to use their premises for solicitation of signatures, votes or other campaign purposes. Plaintiff also has a general policy not to allow outside groups, and by outside groups I mean groups other than their own tenants, to use the premises unless the use will be for a display or some sort of an activity which will be of some attraction to the general public, attracting people to the area. Examples of that policy in effect have been for example, to allow use of the premises for art exhibits by gifted children. Presumably this will attract people who are interested in looking at these things and maybe also, in the process, bring them into some of the stores. Camping exhibits and ecology exhibits were conducted and even in one instance, it allowed a radio sta-

tion to conduct a program whereby people could drop by and leave off a gift for soldiers in Viet Nam.

The defendants, Daniel Fein, Joseph Traugott, and John Powers, are candidates for the offices of United States senator, governor, lieutenant governor in the State of Rhode Island (not necessarily in that order) under the aegis of the United States Socialist Party. Their purpose for using the premises in question is to secure signatures on their nomination papers so that they may secure the necessary five hundred to place them on the ballot in November and also to expound on their political views in an effort to solicit support in the coming election in the event they are on the ballot. Also the testimony indicates, if they are on the ballot, they intend to use the premises at some later time for campaigning purposes; namely, to meet people, pass out leaflets and to expound their views. Their reason for wanting to use this particular area is that it's the most convenient place to meet a lot of people, a lot of Rhode Islanders, to secure signatures and to secure support. The defendants used the premises on three occasions in late July 1970. Some or all used it on all three occasions. On one occasion they used it for approximately one hour and were asked to leave. The area they used on that occasion was marked on an exhibit, Plaintiff's Exhibit "1" in ink. There was testimony that they returned on another occasion and used the other side of the building, were asked to leave and left and that they returned on a third occasion and at that time were served with a temporary restraining order.

The defendants assert, in substance, that they can use these premises for these purposes because of the guarantee of the right of free speech and to assemble in the First Amendment of the United States Constitution. I think it may be well to point out that the right of free speech and all first amendment rights are not absolute and that they may be subject to some regulation at times. There are many examples of this. These rights may also

come in conflict with other rights equally well guaranteed by the United States Constitution. For example, in the courtroom on the criminal calendar we continually have the problem of balancing the first amendment right of free press against the right of the particular defendant before the court to a fair trial. In the area of free speech, there have been limitations imposed by the United States Supreme Court enunciating a clear and present danger doctrine. Limitations are imposed by libel laws enacted by legislatures and by the common law. A person may be free to speak but if he speaks in a certain way he may be criminally or civilly liable, so that the right of free speech is not absolute and this is particularly so when the right conflicts with another constitutional right. We have here involved another constitutional right and that is the right to use one's own property as one sees fit subject to reasonable regulations made in accordance with due process of law. The due process clause of the United States Constitution is applicable both to the states and to the federal government. It guarantees not only life and liberty but property. I should note here that this is not a discrimination case. There is no evidence before the court that these particular defendants have been discriminated against by application of any policy enunciated by the plaintiffs. In other words, there is no evidence that other political parties, other candidates, have been allowed to use these premises to solicit signatures or for campaign purposes.

The crux of the situation is that the Midland Mall in Warwick is private property. Some people may say it's quasi public property. The use of the word "quasi" to me is meaningless. It's a means of covering up or sloganizing the basic concepts and ideas, which must be investigated in order to make a proper determination of the merits of a controversy such as this.

This property is private. However, the public is invited, but the public is not invited for all purposes but

rather for a limited purpose—namely, to shop and to perform functions incidental to the operation of the center. In other words, the public is invited to come upon the Midland Mall for reasons directly connected with the profit-making motives of the owners of the mall. The presence of the defendants there is not pursuant to that invitation. Defendants are there for their own private purposes and not for any purpose directly related to the reason that this shopping center exists.

Cases have been cited to me by counsel for the defendants and discussed by both counsel, to attempt to sustain the proposition that the defendants have a right to be there, to speak there, to solicit support there from customers. It would be well to simply discuss these cases very briefly. The landmark case is *Marsh* v. *Alabama* where the United States Supreme Court held that in a company-owned town where there were no other reasonable alternatives available, a Jehovah witness could not be prevented from disseminating literature in accordance with that person's religious belief. That case is not applicable to the situation here. We are not dealing with a company-owned town. We're not dealing with a situation where there are no reasonable alternatives. The other landmark case is the *Logan Valley Plaza* case also decided by the United States Supreme Court, which stands for the proposition that in labor disputes union people interested in that labor dispute can picket a lessee in one of these shopping areas. I have no dispute with that case. I think it's well decided but again it is not applicable to this situation. The two other federal cases cited to me by Mr. Stanzler, I find inapplicable. The case of *Tanner* v. *Lloyd* which is a district court case in Oregon was also cited to the court. I don't find the court's decision convincing. I am impressed by the reasoning in the case of *Diamond* v. *Bland* decided by the Court of Appeals for the 4th District, 2nd Division, State of California which was filed on May 25, 1970. A copy of that decision was made available to me by Mr. Wells and a copy of that

decision will be filed with the records of this case in the event that it is not reported elsewhere. It would serve no useful purpose for me to go over all the points made in that decision by the three judges who decided it. I would probably come out second best in trying to articulate their views which I agree with. They have done the subject justice.

An important point to keep in mind is that there were reasonable alternatives available to these defendants to pursue their political hopes and aspirations. There are other places where they can solicit signatures. They can campaign in other shopping centers when given permission by the owners which has been given to these defendants in the past. The owners of real property and shopping centers can decide for themselves. There are public parks available. There are sidewalks, public areas of all sorts and house to house canvassing available. This court is not a stranger to political campaigning. When Mr. Fein was on the stand I was reminded that six years ago I was a candidate for the office which he is now seeking and I recall campaigning all over the state but always by permission of those who owned private property.

The consequences of allowing this conduct in this particular case I think would be staggering. If, at this time, the court allowed these three individual defendants and this particular political party to use the premises at the Midland Mall for soliciting signatures and for campaigning purposes then certainly all other candidates for office would be privileged to do likewise even at the same time. It could be chaotic in that area. The court here must indulge in a balancing process. It must balance one constitutional right against another. It must balance the constitutional right to freely speak and to assemble for redress of political grievances against the policy of the plaintiff which is non-discriminatory in nature and effect, which it chooses to promulgate for the protection of its legitimate business interest and protectable property

rights. The defendants first amendment rights can be exercised elsewhere as effectively as it could be exercised on plaintiff's premises. It may not be as convenient but the final result can be as effective. Therefore, the court is striking a balance and both rights are allowed to co-exist. The temporary injunction prayed for may issue enjoining the defendants from soliciting signatures for their nomination papers on the premises of the plaintiff and also from campaigning for political office on those premises. Present an order.

(Adjourned.)